

STATE OF MICHIGAN
COURT OF APPEALS

RDI OF MICHIGAN, L.L.C.,

Plaintiff-Appellee,

v

MICHIGAN COIN-OP VENDING, INC.,
MICHIGAN COINOP VENDING, INC.,
MICHIGAN COIN OP VENDING, INC.,
DOES I-V and DOES VI-IX,

Defendants,

and

JORDAN MIRCH,

Defendant-Appellant.

UNPUBLISHED

June 17, 2010

No. 290605

Oakland Circuit Court

LC No. 2008-088524-CK

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant¹ appeals as of right a September 16, 2008 order finding him liable to plaintiff for \$2,002,294.16. The order is a result of a breach of contract action filed by plaintiff, alleging that co-defendants failed to honor their obligations related to the use of video/computer boards, which were plaintiff's intellectual property. Because the trial court abused its discretion in entering a default against defendant and plainly erred in entering the default judgment, we reverse and remand.

¹ Defendant, Jordan Mirch, will be referred to as "defendant" since he is the only defendant on appeal.

A. LANGUAGE IN ORDER

On appeal, defendant first argues that the trial court's order setting a pre-trial conference for September 16, 2008, was essentially unenforceable because that date fell within a 21-day stay of proceedings. We disagree. A trial court's decision whether to grant relief from an order is reviewed for an abuse of discretion. *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005).

On August 27, 2008, defense counsel's motion to withdraw was granted. The trial court stated on the record that the proceedings would be stayed for 21 days and a status conference at which all parties must appear would be scheduled. A written order allowing for withdrawal and scheduling the status conference for September 16, 2008, was entered at the conclusion of the hearing. Given that the order specified a time and date for the status conference, all parties were bound to follow the order, irrespective of any potential incorrect dates used by the court.² "A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal." *Porter v Porter*, 285 Mich App 450, 465; 776 NW2d 377 (2009). Moreover, a party must comply with an order of the court at the time it is entered, even if the order is clearly incorrect. *Johnson v White*, 261 Mich App 332, 346; 682 NW2d 505 (2004). Whether the court erred when it scheduled the September 16, 2008, date for the conference is thus irrelevant. Accordingly, any argument defendant puts forth relying on that portion of the order being facially invalid because the conference was scheduled to take place within the 21-day stay is without merit.

Defendant's reliance on the trial judge's statements in open court, rather than the written order is also unpersuasive. On August 27, 2008, the trial court told defendant:

So, what I will do is I will stay the case for 21 days and we'll have you appear with or without counsel, and all trial counsel must appear on that status date.

My clerk will give you the date in approximately 21 days. Failure to appear could result in sanctions and/or finding of liability.

I'll sign the appropriate order. We have blank ones here.

First, "[i]t is well settled that a court only speaks through written judgments and orders." *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009). Thus, any proclamations that the trial court made in open court have no binding effect. Second, even if the court's words were given full effect, they could be interpreted as the court setting a conference date in approximately 21 days. The first paragraph quoted above implies that the conference will take place immediately at the end of the stay because of the court's reference to "that" status date in conjunction with the 21-day stay. The court's language in the second paragraph, while

² The 21-day stay that was issued August 27, 2008, would have concluded at the end of the day on September 17, 2008.

admittedly not precise, could be interpreted as saying that the date is undetermined at the moment, but the clerk will select a date that is *approximately* 21 days away. Last, even if the judge's oral directions were not clear, she emphasized that an order would be forthcoming with the pertinent details. And, indeed, an order was entered that same day that (1) allowed defense counsel Shuttie to withdraw, (2) stayed the proceedings "for 21 days," and (3) set a date of September 16, 2008, for a status conference where "all counsel and parties" were required to attend.³ Thus, the trial court did not abuse its discretion when it did not grant any relief to defendant for failing to follow the order, and defendant's claim fails.

B. ENTRY OF DEFAULT

Defendant next argues that the trial court abused its discretion when it entered a default against him for failing to appear at the scheduled status conference. We agree.

A trial court's decision to enter a default is reviewed for an abuse of discretion. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

"A trial court's authority to enter a default or a default judgment against a party must fall within the parameters of the authority conferred under the court rules." *Henry v Prusak*, 229 Mich App 162, 168; 582 NW2d 193 (1998). The trial court defaulted defendant, under MCR 2.401(G)(1), for not attending a pre-trial conference. MCR 2.401(G)(1) provides the following:

(1) Failure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B).

(2) The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that

(a) entry of an order of default or dismissal would cause manifest injustice; or

(b) the failure was not due to the culpable negligence of the party or the party's attorney. . . .

MCR 2.603(A)(1), in turn, provides:

³ This order was also signed by defense counsel, approving it for substance and form.

If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

Thus, under MCR 2.401(G), the trial court was required to excuse defendant's failure to attend the pre-trial conference and not enter a default if it found that the entry of default would cause manifest injustice or if defendant's failure to attend was not a result of his or his attorney's culpable negligence. Here the trial court did not make any findings pursuant to MCR 2.401(G). When defendant's counsel argued at the hearing on his motion to vacate the order finding liability that permitting the default judgment of more than \$2,000,000 to remain in place would result in manifest injustice, the trial court simply replied that there was no excuse for failing to appear at the status conference. Therefore, the trial court appears to have disregarded MCR 2.401(G).

Additionally, this Court has added another requirement before a trial court dismisses a complaint or enters a default as a sanction. Before levying such a severe sanction, a trial court is required to "carefully evaluate all available options on the record" and conclude that the severe sanction of dismissal or default is "just and proper." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995); see also *Dubuc v Golden and Kunz, PC*, 469 Mich 942, 942; 674 NW2d 152 (2003) (Corrigan, C.J., concurring) (acknowledging that *Vicencio* is controlling authority from the Court of Appeals that applies to MCR 2.401(G)).

Here, the trial court did not consider any other sanctions. The court, without any analysis, consideration, or weighing of options, simply stated it was "going to issue a finding of liability, noting that we've waited, [and no] one's appeared on behalf of the defendant." Accordingly, the trial court abused its discretion when it failed to evaluate any other available options on the record. On remand, the trial court is to evaluate less drastic sanctions as directed in *Vicencio*, 211 Mich App at 506-507.

C. ENTRY OF DEFAULT JUDGMENT

Defendant argues that the trial court improperly entered a default judgment when it failed to give defendant an opportunity to participate in the damages phase. We agree. While defendant raised the general issue of setting aside the default judgment, he did not argue that it should be set aside because of a lack of notice, thereby not preserving the issue for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 2.603(B)(1) provides, in pertinent part:

(a) A party requesting a default judgment must give notice of the request to the defaulted party, if

(i) the party against whom the default judgment is sought has appeared in the action

(b) The notice required by this subrule must be served at least 7 days before entry of the requested default judgment.

Here, defendant did appear previously in the action, so defendant was entitled to at least seven days' notice before entry of any default judgment. No such notice happened, however. The trial court contemporaneously defaulted defendant and entered a default judgment in the same proceeding on September 16, 2008. The court treated the default and default judgment as a single event. There is, however, a significant difference between the two events. As this Court noted:

[T]he purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that he may have an opportunity to participate in any hearing necessary to ascertain the amount of damages or other form of remedy to be granted. This underlying purpose is premised on the distinction between the entry of default and the entry of judgment: the former operates as an admission by the defaulting party of issues of liability but leaves the issues of damages unresolved until entry of judgment. The latter reduces the default to a judgment for money damages. Once a valid default is taken, the defaulting party remains entitled to full participatory rights in any hearing necessary for the adjudication of damages [*Dollar Rent-A-Car Systems v Nodel Const Co*, 172 Mich App 738, 743; 432 NW2d 423 (1988) (internal citations omitted).]

The court providing no notice to defendant constituted plain error. Plaintiff argues that, regardless of any notice violation, the end result will remain unchanged because the damages were all enumerated in the complaint and lease agreement. While this may be true, this Court cannot assume it will be the case – that is the very reason to allow defaulted parties an opportunity to participate in any damages determinations. *Id.* Defendant was deprived of this substantial right. Accordingly, in addition to the erroneous entry of default, *supra*, Part B, because of the trial court's failure to provide the seven-day notice as required by MCR 2.603(B)(1), the judgment is reversed.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto